

IN THE MATTER OF THE ARBITRATION BETWEEN:)	
)	
CLERMONT COUNTY SHERIFF)	FMCS CASE NO:
)	08-00909
Employer)	
)	
and)	
)	
FRATERNAL ORDER OF POLICE, OHIO LABOR)	
COUNCIL, LODGE 112)	
)	
Union)	
)	

DECISION AND AWARD

ARBITRATOR: Saundria Bordone

AWARD DATE: August 6, 2008

APPEARANCES FOR THE PARTIES:

EMPLOYER: Elizabeth Mason, Assistant Prosecuting Attorney, Clermont County

UNION: Kimberly A. Rutowski, Hardin, Lazarus, Lewis & Marks, LLC

I. Introduction

Using the services of the Federal Mediation and Conciliation Service, the undersigned was selected as Arbitrator. An arbitration hearing was held June 2, 2008, in Batavia, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral and written argument. No stenographic record of the hearing was made. Briefs were filed, the last of which was received July 12, 2008. The parties stipulated that the issue is:

Was the Grievant's 60-day suspension for just cause? If not, what shall the remedy be?

II. Relevant Contract Language

The parties' two most recent collective-bargaining agreements were effective by their terms from March 1, 2003 through February 28, 2006, and from March 1, 2006 through February 29, 2008. The Employer referred to the following provision of the agreement which expired in 2006 as being relevant:

Article 9 Personnel File

* * * * *

Section 9.3 Records of verbal warning shall cease to have force and effect six (6) months from the date of issuance, and shall upon request be removed from the personnel file, provided no intervening discipline has occurred. Written reprimands and suspensions of less than five (5) days shall cease to have force and effect two (2) years from the date of issuance, suspensions of five (5) days or more shall cease to have force and effect three (3) years from the date of issuance, and, shall upon request of the Employee, be removed from the personnel file, provided no intervening discipline has occurred.

Relevant provisions of the more recent agreement follow:

Article 7. Grievance Procedure

* * * * *

Section 7.3 Grievance Procedure.

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Step 3. Arbitration.

* * * * *

B. The arbitrator shall have no power to add to, delete from, or modify the terms of this Agreement, but may interpret and apply same.

Article 8. Discipline

Section 8.1. Just Cause Needed to Discipline.

The tenure of every bargaining unit Employee of the Clermont County Sheriff's Office shall be during good behavior and efficient service. No Employee shall be reduced in pay and position, suspended, discharged, or removed except in accord with the provisions of this Agreement. The Employer may take disciplinary action against any Employee in the bargaining unit only for just cause.

Article 9 Personnel File

* * * * *

Section 9.3. Retention of Discipline Records.

Records of discipline shall cease to have force and effect and shall, upon request from the Employee be removed from an Employee's personnel file, provided no intervening discipline has occurred according to the following:

Verbal warnings	six (6) months from the date of issuance
Written reprimands	twelve (12) months from the date of issuance

Suspensions

of less than five (5) days	two (2) years from the date of issuance
of five (5) days or more	three (3) years from the date of issuance

III. Facts¹

The Grievant has been employed by the Employer as a Corrections Officer at the Clermont County Jail for about six years.² On November 14, 2007,³ the Grievant was notified in writing that he was being suspended for 60 days because, “on September 26, 2007, you committed a Group III Offense, (A) Wanted [sic] or willful neglect in the performance of assigned duties or in the care, uses or custody of any CCSO property or equipment.” The Employer’s October 3 letter to the Grievant advising him of his pre-disciplinary hearing scheduled for October 8, described the incident leading to this suspension as follows:

On September 26, 2007 at about 14:56 hours you dropped off property in Booking, [the Corporal] advised you that the property needed to be receipted. This apparently upset you and you turned and went down 306 hallway, you were so upset that you slammed our security camera into the ceiling. Once again the issue here is your inability to control your temper.

The pre-disciplinary hearing was held October 8 as scheduled, and the hearing officer’s report includes the following, among other things:

Summary of Allegations:

The allegations are that on September 26, 2007 at approximately 14:56 hours [the Grievant] committed two acts in violation of the personnel and operation policies of the Clermont County Jail. The specific allegations are: 1) that he disregarded [the Corporal’s] instructions to receipt property per stated procedures; and 2) that he willfully disregarded policies regarding the use and/or abuse of property belonging to the Clermont County Jail by intentionally striking a security camera located adjacent to door 306 and subsequently causing it to be out of position and preventing central control from having an unobstructed view of that hallway.

¹ Some evidence presented by the parties but not considered material to the issues as framed in Part V. below, is not described here.

² Facts not attributed to their source, are not contradicted by record evidence.

³ All dates are in 2007 unless otherwise indicated.

* * * * *

Exhibits reviewed: During the hearing the following exhibits were reviewed by all present:

- 1) All of the documents mentioned above were reviewed and it was determined that everyone had reviewed those documents prior to the hearing.
- 2) Five digital pictures of the hallway leading to door 306 that depict [the Grievant] walking towards door 306
- 3) Three digital photos showing the position of the camera after it had been moved.
- 4) A written statement from [the Grievant] addressed to Chief Willis.

On October 10, 2007, I received and reviewed a copy of the digital video of [the Grievant] walking towards door 306.⁴ This clip was also sent to [the Union representative] and I have confirmed that she also viewed the clip.

* * * * *

Conclusions: After review of the testimony and exhibits it is clear that [the Grievant] struck the camera and caused it to be moved out of position. [The Grievant's] statement is "While waiting for door 306, I noticed the camera appeared to be pointing downward more than normal. I pushed up gently and the camera flipped up". It is clear from the video clip that the camera moved immediately when [the Grievant] walked under it. There was no delay or any other indication that [the Grievant] was waiting under the camera. In addition, it is a challenge to determine where the camera is pointing without assistance from control. As stated earlier, the accepted procedure is to contact control and coordinate the positioning of the camera. Lastly, upon inspection of the camera after it had been moved, found the fastening system to be working properly and had to be loosened in order to reset the position of the camera.

Therefore, I find that there is sufficient evidence indicating that [the Grievant] is guilty of the policy infractions as alleged and that appropriate disciplinary sanctions be imposed per the policies of the Clermont County Jail.

The Employer submitted into evidence as its exhibit A, a DVD, the contents of which are a series of still shots of the hallway which runs from the booking area to door 306 outside of which the camera at issue is positioned. The still shots were taken by the camera at issue. There are what appears to be 19 frames on the DVD. Frames 3 through 13 show the Grievant walking from the booking area toward the camera, and frames 14 through 19 show the ceiling and a light fixture in it. There is enough variance in the

⁴ Employer's Exhibit A is a DVD containing a short video taken by the camera in question at the time of the incident at issue. This video, which is described in more detail below, appears to be the same video as the one submitted to the hearing officer after the pre-disciplinary hearing.

composition of frames 14 through 19 to show that they are individual frames.⁵ Although the Employer was unable to state the rate at which these individual frames were shot, it appears to be about one frame per second inasmuch as the Clip which appeared to contain 19 frames lasted about 20 seconds. Although the data missing from the original live video makes the DVD's contents less than dispositive, it clearly does not show the Grievant striking or raising his hand to strike the camera. It is apparent, however, that the camera was not "slam[ed] into the ceiling" although it was tilted so that it was aimed at the ceiling. Although the Grievant is shown in 13 of the frames, the expression on his face is visible in only the last 2 frames in which he is pictured. Neither the Grievant's expression nor what can be discerned of his posture and manner of walking, given the stop action nature of the video, show apparent anger or joy.

The Employer presented four witnesses, one of whom was the Sergeant who was the shift commander at the time of the incident leading to the Grievant's 60-day suspension. The Sergeant investigated the incident on behalf of management, and reported to higher management on that investigation and what policies and regulations he considered to have been violated. His memorandum containing the report is dated October 1, 2007. The Sergeant testified on direct examination that he was in the booking area at the far end of the booking counter⁶ from the Grievant and the Corporal at shortly before 3:00 p.m. on September 26. According to the Sergeant, he was aware that the Grievant and the Corporal were having a conversation because he glanced down at them and heard some conversation, but he did not hear what was said. The Sergeant testified that he did not recall hearing raised voices. According to the Sergeant, shortly after the Grievant left the booking area and proceeded down the 306 hallway, the corrections officer working booking at the time (Booking Officer) received a telephone call which the Booking Officer told the Sergeant was from the corrections officer in central control who was monitoring the security cameras (Monitoring Officer). The Sergeant testified that the Booking Officer told him the Monitoring Officer had said that the camera at the

⁵ The Jail's Administrator explained that the video from the surveillance cameras is stored by the computer in these discreet shots to save storage space, but he did not know the precise time interval between the shots.

⁶ The Sergeant estimated the booking counter to be about 60 feet long.

end of the 306 hallway (306 camera) was aimed at the ceiling and asked that the Booking Officer go down and realign it. On cross examination, when asked for more detail, the Sergeant testified: “When [the Booking Officer] got the call, he looked at me. I said something to the effect, ‘What?’ He said, ‘Camera. Must have been [the Grievant] pissed at [the Corporal].’” According to the Sergeant on direct examination, he directed the Booking Officer not to touch anything, and went to administration to view the recording of what the camera had shown regarding what had happened to it. The direct examination continued:

Q. What did you see when you viewed the recording?

A. [The Grievant] comes walking down the hall directly towards door 306, looked up as he – looked up into the camera, struck the camera, camera shot boom straight up to the ceiling. And that was it.

Q. Are you sure that his arm reaching up shows on that video – or CD?

A. Well I guess that I would have to look, but

Q. Did you consider – Well what did you do next?

A. Notified – I think the chief – [the Lieutenant]. I went and got a camera, took photos of it, and started reviewing the entire incident and what led up to it.

* * * * *

Started reviewing it. Checking it out. Spoke to [the Booking Officer], [the Corporal] at the time. Just basically started reviewing the entire situation and preparing a memorandum for punishment.

The Sergeant testified that he did not talk to the Grievant that afternoon and he did not remember “how we secured the Grievant’s statement.” On cross examination, the Sergeant said he did not remember having a conversation with the Grievant, but he assumed he had the Grievant’s (undated) statement assembled with the others before he submitted his report. Also on cross examination, when asked if the Monitoring Officer had said that he saw the Grievant strike the camera, the Sergeant answered, “No. He [the Monitoring Officer] did not know what happened.”

According to the Sergeant, it is the responsibility of the maintenance department to deal with camera problems, but, inasmuch as the shift for the maintenance employees had ended, he realigned the camera himself. He testified that the camera was aimed at

the ceiling and he had to stand on something and loosen a wingnut before he could reposition the camera. According to the Sergeant, he communicated with central control by radio while he positioned the camera in order to align it to obtain the proper view of the hallway.

Following this above testimony of the Sergeant on direct examination, the DVD of what had occurred in 306 hallway was played. The Sergeant identified the clip as being the same one he had watched on September 26, and he acknowledged that it did not show the Grievant reaching up to strike, or striking the camera.

The Sergeant's October 1 report to higher management (addressed to his Lieutenant) regarding his investigation states the following before it indicates the policies and regulations he believes the Grievant violated:

I submit this memo for your review and disposition concerning [the Grievant] and his actions on 09-26-07 at 1456 hrs.

On 09-26-07, I was in Booking conversing with [the Booking Officer]. He received a call from Central Control, [the Monitoring Officer]. [The Monitoring Officer] advised that the camera directly over door 306, monitoring the 306 hallway towards Booking was pointed directly at the ceiling (See attached photos). The camera was in fact pointed at the ceiling. [The Booking Officer] made the comment, "It must have been [the Grievant], pissed off at [the Corporal]." Moments prior to this, I was on the 305 hallway side of the Booking counter. I did hear some conversation between [the Corporal] and [the Grievant] from the opposite end of the counter. I heard [the Corporal] advise him that the property needed to be receipted. (Photo of property enclosed). That was the extent of the conversation that I heard. [The Grievant] departed Booking. [The Booking Officer] advised me of the conversation. (See attached statement). I reported to Administration and reviewed video from the 306 camera. (Video and slide show photos enclosed). The video reveals [the Grievant] walking from Booking to door 306, looking directly at the camera as he passes under it and striking it, knocking it upwards towards the ceiling. I have also enclosed statements from [the Corporal] and [the Monitoring Officer]. [The Corporal] specifically to the conversation with [the Grievant] prior to the incident and [the Monitoring Officer's] concerning when he noticed the camera angle and reporting it to Booking staff.

The Corporal, an Employer witness, testified on direct examination that, on September 26, the Grievant came into the booking area with inmate property that had been received in the mail but could not be given to the inmates, and asked that the Corporal place the property in the inmates' property baskets. According to the Corporal,

she “asked if the items could be receipted.” When asked what the Grievant responded, she testified that she could not recall exactly what he had said but he had left the property laying on the counter and walked over to the cubby hole where the copier is. The Corporal testified that she heard a noise and then the Grievant walked back down 306 hallway. When asked on direct examination, “When you asked [the Grievant] to prepare the receipts, what was his attitude?” the Corporal answered, “I thought it was negative.” To the next question, “Did you feel that he was angry with you for asking him to do that?” the Corporal answered, “Yes.” According to the Corporal, she did not recall other conversation with the Grievant. When asked if she raised her voice while talking to the Grievant, the Corporal responded, “Not that I thought I did.” When on cross examination the Corporal was asked if the Grievant had said anything nasty to her or had shown that he was angry, she responded that his tone of voice was negative towards her when he said they did not do receipts.

The Corporal’s September 26 written statement to the Sergeant regarding what had occurred is in evidence, and states:

I am submitting this memorandum due to the actions of [the Grievant] on September 26, 2007. At approximately 1500, [the Grievant] reported to Booking with the mail from South Central. [The Grievant] advised myself that there were several pieces of property that I needed to ensure was placed in the correct inmates property bags in the property room. I looked at the property and there were only basket numbers written on the property. I asked [the Grievant] if there were receipts completed on the property and he stated “No, we don’t do that.” I then stated the property needs to be properly receipted prior to it being placed in the property bags. [The Grievant] replied “their envelopes were marked with the property being placed in their property bags.” He then turned and walked away from booking leaving all property on the booking counter.

The Booking Officer was called by the Employer as a witness. He testified that, on September 26, he saw the Grievant enter booking and go to the booking counter where he talked to the Corporal, and they were talking back and forth about receipting mail. According to the Booking Officer, he heard the Corporal tell the Grievant that the mail needed to be receipted, and the Grievant respond saying something like, “I haven’t done it in 2 years.” When asked on direct examination, “When [the Grievant] left the booking area, did he, based on your observation, seem angry?” the Booking Officer responded, “A little, Ma’am.” When asked why he said that, the Booking Officer answered, “Because

when he went back into the [cubbyhole] area, the loud bang, and then he walked quickly down the hallway to 306,” and that he did not personally see the Grievant drop the mail bin, but it was sitting on the floor in front of the copier when the Grievant left. When asked where the mail bin goes, he said it belonged there in front of the copier although sometimes it was kept on the window ledge.

The Booking Officer’s September 26 written statement regarding what occurred states:

On the above date I over heard [the Corporal] and [the Grievant] talking about writing receipts on incoming Inmate property. I then witnessed [the Grievant] drop the mail bin on the floor in the copier room and walk down 306 hallway. At this time central control contacted me and asked me to go fix the camera it just flipped up towards the ceiling. [The Sergeant] asked me what was going on and I advised him of the situation and he told me not to touch the camera.

The Monitoring Officer did not testify at the arbitration hearing. but his September 26, 2007 statement was admitted into evidence. It states:

On the above date, I was monitoring Central control when I noticed a camera pointing at the ceiling after I signed in an Attorney and let Brown Co. Sheriff dept. out of the sally port. When I returned to do a camera scan, the 306 camera pointing down the booking hallway was straight up in the ceiling. I then called booking and spoke with [Booking Officer] and asked him to fix the camera. The last person I saw walking down the 306 hallway was [he Grievant] which was carrying something to booking and put it on the counter top.

The Union President, a corrections officer at the Jail, testified that he has been involved in the realignment of two security cameras in the past. One was the camera at issue here. He testified that the Sergeant was involved in at least one of the realignments, and that to aim a camera properly one has to be in touch with central control.

The Grievant testified as to what occurred on September 26. He described his conversation with the Corporal about receipting. When asked if he had raised his voice in the conversation with the Corporal, he said that he had not. He testified that he had put the mail bin on the copier and it had accidentally fallen off. He said he left the booking area and

I was walking down the hallway. I looked at the camera and it looked to me like it had been moved down so I went to put my two hands up like this. I went to adjust it and it flopped over. I just went to give it a little nudge and it flopped over. So I went to adjust it again. I pushed the button to get the door opened and

I waited for the door to open. I went to move it [the camera] back down and it was loose so far and it tightened up right away. So I let it sit.

The Grievant went on to explain that he had intended to put in a maintenance request regarding the camera, but he did not have a radio, and when he got to supermax and relieved the officer as he was supposed to, he got busy. Then he heard the Sergeant announce over the radio that they were fixing the camera, so he thought no more about it.

The Employer provided evidence of the Grievant's past discipline. He was given a verbal warning on May 27, 2003, for, on May 25, 2003, violating departmental regulation #20b – Courtesy. He was given a written reprimand on August 28, 2003, for, on August 13, 2003, leaving a door propped open and thus allowing an inmate to enter the control room and obtain contraband in violation of departmental regulation #7. On June 14, 2005, he was suspended for six days for the use of unnecessary force on two inmates on separate occasions. On September 14, 2005, he was suspended for six weeks and was required to attend Anger Management Counseling “or any other assistance that will prevent future uncontrolled outburst.” His August 18, 2005, notice of the charges resulting in this suspension states:

You are charged with three Group III Offenses, First count: (t) Willful or wanton failure to observe departmental rules, regulations, policies, procedures or rules of conduct. Regulation 20, Courtesy: Employees shall be courteous and respectful to citizens and other employees. I have now included five separate incidents where [the Grievant] has failed to exercise patience or use any kind of discretion while performing his duties. Second Count: (s) For conduct subversive to the good order and discipline of the department. On August 2, 2005 in the South C Control Room you were screaming and cursing at [another officer], you even threatened to cause him bodily harm. You instructed [him] to “get the fuck out of my control room before I beat your ass”. Your third count of a Group III offense is (o) Insubordination. For failure to conform to the rules and regulations of this office. Two months ago you lost control of your temper and you were suspended for six days without pay for using excessive force on inmates. You have received verbal counseling, written reprimands and were suspended without pay all due to your inability to control your temper. This office will no longer tolerate your inability to even act like a professional while in uniform.

The evidence shows that the Grievant completed all counseling and training required by the Employer and he had not received counseling or any other discipline since the above-described 2005, 6-week suspension until the 60-day suspension at issue here. The Grievant's most recent annual evaluation, which covers the year ending

October 30, 2006, is also in evidence. It was completed by the Sergeant and shows ratings of “satisfactory” in six categories and of “very good” in the remaining category.

The rater comments section includes the following, among other things:

[The Grievant’s] last evaluation was dramatically and negatively impacted by discipline that he received and currently has on file. Based upon his performance since then, it appears that he is or has dealt with the issues as it has reflected positively in this evaluation. I would encourage [him] to continue on this course.

There is no evidence that the camera was damaged.

IV Positions of the Parties

A. The Employer’s Position:

The Employer’s brief states that this grievance “relates to the Sheriff’s decision to suspend [the Grievant] for a period of sixty working days as progressive discipline for [the Grievant’s] inability to control his anger.” With regard to the September 26 occurrence, the brief states:

[T]estimony and documentary evidence supports the Sheriff’s contention that Grievant, easily frustrated when required to handle anything he considers to be outside his normal routine, became angry and impatient with a Jail supervisor [the Corporal] when she instructed him to prepare receipts for mail to be placed in inmates’ property baskets. Grievant raised his voice to the supervisor⁷, refused to prepare the receipts then, when heading up a hallway to return to his duty station, acted out his displeasure by striking a security camera hard enough to change its alignment.

The brief also states that the above referenced Jail supervisor, the Corporal, in her testimony, “described [the Grievant’s] demeanor and attitude as “negative toward her” and “angry.”⁸ Regarding the Grievant’s assertion that he was attempting to adjust the camera, the brief states: “It is important to note that [the corrections officer, Union witness] testified without reservation that in order to adjust or realign a camera, at least two people are necessary: one to move the camera housing and another person at the video monitor to determine when the camera was back in proper alignment;” and “Even

⁷ There is no record evidence that the Grievant raised his voice.

⁸ As set forth in Part III. above, although, on direct examination, the Corporal did respond “Yes” to the leading question, “Did you feel that he was angry with you for asking him to do that?” the Corporal did not use the word “angry” in her testimony.

assuming Grievant found a camera out of alignment, he failed to follow” the reporting policy stated in, paragraph Q of the Employer’s General Order 91.5.3 Security Inspections (Union Exhibit 5):

Corrections personnel becoming aware of security or safety devices or equipment that is damaged or in need of repair as a result of a “security spot check”, random cell/dayroom search or simply during the performance of their duties while at the facility will immediately submit a Maintenance Request and notify the first line supervisor of the problem.

The Employer defines “just cause” with regard to this case by quoting an author⁹ as defining just cause for discipline as follows:

Proper or sufficient reasons for disciplinary measures imposed on workers by management. The term is commonly used in agreement provisions to safeguard workers from disciplinary action which is unjust, arbitrary, capricious or which lacks some reasonable foundation for its support.

Disciplinary action also may be held lacking ‘just cause’ if the penalties bear no reasonable relationship to the degree of the alleged offense. The just cause justifying a discharge generally is related to the employee’s work ... and reflects the employee’s willful disregard of the employer’s interests.

The Employer’s position can best be represented here by quoting the Conclusion of its brief:

Grievant asserts that he did not do anything to deliberately or maliciously misalign the 306 camera. The Sheriff does not believe him.

Grievant has a history of acting out when he is angry or frustrated. On September 26, 2007, Grievant was running late to relieve an officer in another area of the Jail. He became angry with [the Corporal] because responding to her request to prepare receipts for the mail would have delayed him further. Grievant knew he was required to prepare the receipts, but he typically became entangled in his own inability to deal with a situation that required him to handle two priority tasks at once. In this case, Grievant convinced himself that [the Corporal] was in the wrong, and chose to ignore one priority to address the other, taking out his frustration on the security camera. Perhaps he did not expect it to move. Perhaps he hit it harder than he intended. But he did not attempt to adjust it.

There was no history of the 306 camera becoming spontaneously misaligned. Prior to Grievant’s passage down the 306 hallway, there had been no complaint about the camera alignment on September 26. Grievant knew he could not re-

⁹ The brief cites *Robert’s Dictionary of Industrial Relations*, Harold S. Roberts, Third Edition, 331, BNA 1986.

align a camera without assistance from someone at the appropriate monitor, and, once having struck the camera, leaving it uselessly pointing at the ceiling, Grievant failed to notify anyone of what was now a real problem.

Grievant's conduct in this regard is exactly what [the fitness for duty psychologist] described: ... The Sheriff was justified in ordering both a sixty work day suspension and additional counseling.

The Sheriff has invested considerable time and money in Grievant's training. When Grievant's problems with impulse control came to his attention, the Sheriff gave Grievant clear and repeated guidance and additional training to help him conform his conduct to the Sheriff's standards. Indeed, between 2005 and 2007 Grievant seemed to have gained the necessary control to be a successful corrections officer. To be sure, there is little leeway in the corrections setting for an employee who uses violence or threats to express his frustration with his job. In this matter, even though two years have passed since the last outburst, the Sheriff is justified in taking reasonable steps to address this problem with Grievant. The Sheriff had "proper or sufficient reasons" for the disciplinary action he took. That his, a sixty work-day suspension is not "unjust, arbitrary, capricious" and has a reasonable foundation for its support.

B. The Union's Position:

In its brief, the Union defines "just cause" by referring to the "Daugherty test"¹⁰ which the brief states as:

A negative answer to any of the following seven questions signifies that just cause does not exist for discipline:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?

¹⁰ The brief cites *Summit Cty. Children Servs. Bd. v. Communication Workers of Am. Local 4546*, 113 Ohio St. 3d 291 and states, "The Ohio Supreme Court specifically approved of an arbitrator's use of the Daugherty test, though the Court stated that it was not the only method."

5. At the investigation did the ‘judge’ obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, order, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

The Union argues that, in this case, the answers to the “Daugherty test” questions 3, 4 and 5, are negative; the Grievant did not have an angry outburst; the Grievant did not strike the camera; there is no written policy concerning the jail cameras or requiring that contraband be “receipted;” the Employer “is inappropriately attempting to use past discipline to prove that [the Grievant] acted out of anger;” and the County ignored policies and procedures by not using an “Internal Affairs Function” to investigate the incident in question in that “Internal Affairs is supposed to investigate all Group II and Group III offenses where more than a three (3) day suspension is the penalty.” The brief also argues that it is the duty of corrections officers to adjust security cameras in accordance with paragraph M. of the Employer’s General Order 91.5.3 Security Inspections (Union Exhibit 5) which provides in relevant part:

Corrections Officers will be vigilant in ensuring that security devices are functional and not tampered with and that security conditions are at acceptable levels to include but not be limited to the following:

1. Ensuring that security devices at their assigned posts are operational to include;

* * * * *

- b) Video and audio monitoring devices such as monitors, cameras, intercom systems, door control systems.

The Union’s brief notes that, until the Sergeant viewed the DVD in evidence¹¹ during the arbitration hearing, the Sergeant contended that the video clip showed the Grievant “raising his arm and striking the camera,” and this “blatant inaccuracy” in the Sergeant’s memo reporting the results of his investigation to higher management, “set the stage for the entire disciplinary process.” The brief continues:

¹¹ Employer Exhibit A.

Perhaps this is why [the Grievant] was not interviewed by anyone prior to the pre-disciplinary hearing. Clearly, the County believed an interview was pointless because [the Sergeant] stated there was clear video evidence. [The Grievant] was already tried and convicted based on [the Sergeant's] false statement.

The Union's position as stated in the Conclusion of its brief follows:

The County failed to conduct a fair investigation into this incident and failed to establish just cause for discipline. First [the Sergeant's] false statement in the October 1, 2007 memo that the video showed [the Grievant] striking the camera clearly was the basis for the discipline. [The Grievant] was not interviewed and the video was not played at the pre-disciplinary hearing. It is apparent that [the Grievant] was convicted based on his past discipline rather than on the facts of the case. Progressive discipline is used to establish the penalty, not the rule violation.

Secondly, the County failed to follow written policies and fabricated (1) the unwritten policy that only maintenance repairs and realigns cameras and (2) the policy that all contraband mail is "receipted."

Finally, [the Grievant] testified that he was attempting to readjust the camera. No one bothered to question him. Why would anyone intentionally strike a camera knowing it was recording?

V. Decision and Discussion

The Employer has the burden of proving that it had just cause for disciplining the Grievant.¹² There are various definitions of the term just cause,¹³ as shown by the two divergent ones offered by the parties.¹⁴ Regardless of the definition applied, however, the more accepted ones encompass an element of due process which includes informing the employee of what the charges are.¹⁵ Here, the November 14 suspension order states that the Grievant was being suspended for 60 days because, "on September 26, 2007, you committed a Group III Offense, (A) Wanted [sic] or willful neglect in the performance of

¹² Elkouri & Elkouri, How Arbitration Works 349 (Alan Miles Rubin ed., 6th ed. 2003).

¹³ See generally Discipline and Discharge in Arbitration 29-92 (Norman Brand ed., BNA Books 1998); Discipline and Discharge in Arbitration 2001 Supplement 3-16 (Anne L. Draznin ed., BNA Books 2001); Elkouri & Elkouri, How Arbitration Works 930-33 (Alan Miles Rubin ed., 6th ed. 2003); and cases cited therein.

¹⁴ I am familiar with the Daugherty test referenced by the Union. I am not familiar with the authority referenced by Employer and do not have access to the book cited to examine the context of the paragraphs quoted in the Employer's brief and in Part IV.A., above.

¹⁵ See Discipline and Discharge in Arbitration 35-37, 43-45 (Norman Brand ed., BNA Books 1998) and Discipline and Discharge in Arbitration 2001 Supplement 6 (Anne L. Draznin ed., BNA Books 2001).

assigned duties or in the care, uses or custody of any CCSO property or equipment.” The October 3 notice to the Grievant of his pre-disciplinary hearing described the incident leading to this suspension as follows:

On September 26, 2007 at about 14:56 hours you dropped off property in Booking, [the Corporal] advised you that the property needed to be receipted. This apparently upset you and you turned and went down 306 hallway, you were so upset that you slammed our security camera into the ceiling. Once again the issue here is your inability to control your temper.

The Employer’s brief states that this grievance “relates to the Sheriff’s decision to suspend [the Grievant] for a period of sixty working days as progressive discipline for [the Grievant’s] inability to control his anger.” Accordingly, I will address this situation in the context of this framing.¹⁶

The threshold issue is whether the Grievant engaged in the conduct for which he was disciplined – the “want[on] or willful neglect in the performance of assigned duties or in the care, uses or custody of any CCSO property or equipment” by becoming “so upset that [he] slammed [the] security camera into the ceiling.” The terms, “abuse,” “willful,” and “wanton” need definition. Given those available,¹⁷ it would appear that the most suitable definition in the context here for “abuse” is “to use so as to injure or damage,” to “maltreat;” for “willful” is “done deliberately,” “intentional;” and for “wanton” is “having no just foundation or provocation,” “malicious.” So, did the Grievant intentionally use the camera so as to injure or damage it?

Presumably, only the Grievant knows what actually occurred with the camera. The video does not show it, and no eye witnesses were presented. My determination here

¹⁶ Inasmuch as the Grievant was not charged with the conduct of “improper receipting,” failure to receipt the mail upon direction by the Corporal, using improper procedures to realign a camera, attempting to realign a camera without assistance, or failing to report a camera needing repair or adjustment, these matters, and issues tangential to resolving them, will not be addressed here.

¹⁷ Merriam-Webster Dictionary online at <http://www.merriam-webster.com/>, gives the following definitions:

Abuse - 1 a: to put to a wrong or improper use <abuse a privilege> b: to use excessively <abuse alcohol>; also : to use without medical justification <abusing painkillers> 2 *obsolete* : deceive 3: to use so as to injure or damage : maltreat 4: to attack in words : revile.

Willful - 1 obstinately and often perversely self-willed <a stubborn and willful child> 2 done deliberately: intentional <willful disobedience>

Wanton - 1 *archaic*: hard to control: undisciplined, unruly b playfully mean or cruel: mischievous 2a lewd, bawdy, b: causing sexual excitement: lustful, sensual 3a: merciless, inhumane <wanton cruelty> b: having no just foundation or provocation: malicious <a wanton attack> 4 being without check or limitation: a: luxuriantly rank <wanton vegetation> b: unduly lavish : extravagant <wanton imagination>

will not be dispositive of what actually happened either. My job is not to ferret out the truth as to what happened. Rather, it is to determine whether the Employer has met its burden of proving that the Grievant engaged in the charged conduct. In doing so, I act as a disinterested individual, objectively examining the evidence presented at the arbitration hearing.

The Grievant admits that he touched the camera, but only in an attempt to realign it slightly because he thought it was misaligned. Contrary to what the Employer appears to argue, albeit in the alternative, this conduct, admitted by the Grievant, does not rise to the level of wanton or willful abuse. The Employer contends that it does not believe the Grievant's explanation, and by extension that I should not.¹⁸ However, the Employer has a burden of proof to meet before the Grievant has to explain anything.

The Employer appears to argue that it should be determined that the Grievant was angry and, then, it should be inferred that, because he was angry, he intentionally maltreated the camera by striking it – “slamming it into the ceiling.” The direct evidence that the Grievant was angry is limited to the Corporal's answering in the affirmative to the leading question, “Did you feel that he was angry with you ...?” and the Booking Officer's answering, “A little, Ma'am,” when asked if the Grievant seemed angry. No one testified to the Grievant having raised his voice or having engaged in any other behavior indicating anger when he was in conversation with the Corporal. The testimony that, when the Grievant was out of sight, there was a loud noise which was assumed to be the Grievant dropping the mail bin to the floor in the place where the evidence indicates it belongs, and then walking quickly down the hall, does not necessarily demonstrate anger. The Grievant testified to one of the other logical explanations for the noise, which is that the mail bin accidentally fell off the copier where he had put it; and it seems a stretch to interpret walking quickly as anger.¹⁹

¹⁸ Although I am not familiar with the authority the Employer cited for its definition of just cause, it is reasonable to assume that the issue of whether there were “proper and sufficient reasons for disciplinary measures” imposed, is to be examined from an objective rather than a subjective point of view. In other words, would a reasonable person in the same situation come to the same conclusion – that the Grievant was not telling the truth.

¹⁹ The witness' assumption that the noise was caused by the Grievant's expression of his alleged anger, rather than other logical causes, tends to indicate that, before he heard the noise, the witness had assumed the Grievant was angry.

The Employer also invites the inference that the Grievant was angry on this occasion, from the Grievant's past discipline for lack of control of his temper; the allegedly frustrating conversation between the Grievant and the Corporal just prior to the incident with the camera; and an assertion that cameras do not fall out of alignment on their own. Contrary to the Employer's scenario, it does not seem appropriate to infer from his disciplinary record that the Grievant would let his September 26 conversation with the Corporal, frustrating or not, anger him to the point of striking a security camera, especially when he knew it was photographing him at the time. The last occurrence for which the Grievant received discipline of any kind happened two years prior to the incident at issue here. The Grievant completed, at least partially at his own expense, all the training and counseling the Employer required. There is absolutely no evidence in the record that the Grievant engaged in any behavior, angry or not, which was objectionable to the Employer in that two-year period. In fact, the remarks in his last annual appraisal seem to indicate that the Sergeant thought the Grievant had his temper under control. Given the Grievant's work environment, it is very probable that during the two years he was free of discipline he encountered quite a number of circumstances that were at least as frustrating to him as the September 26 conversation with the Corporal. However, no evidence presented at the hearing indicates that he engaged in any objectionable behavior as a result. Regardless of whether it would be sufficient to justify the 60-day suspension as the penalty if it were independently established that the Grievant had engaged in the violative conduct, the Grievant's disciplinary record is an insufficient basis from which to infer that he was angry on this occasion.

Thus, the assumption that the Grievant was angry because of the conversation with the Corporal, without more evidence of angry behavior, does not prove that he was angry. Likewise, the lack of any obvious cause for the camera to become out of alignment at the time it did, does not prove that the Grievant was angry.²⁰ Just showing that a person could have become angry in a situation, or an angry person could have been the cause of something, does not prove that it happened that way.

²⁰ In any event, the Grievant admitted that the camera became aimed at the ceiling as a result of his having touched it as discussed above.

I do not know what caused camera 306 to be tilted toward the ceiling at about 3:00 p.m. on September 26, 2007. However, I am unable to make the series of inferential leaps necessary for me to find that the Employer has met its burden of proving to me, a disinterested individual, objectively viewing the evidence presented at the hearing, that the Grievant “on September 26, 2007, ... committed a Group III Offense, (A) Wanted [sic] or willful neglect in the performance of assigned duties or in the care, uses or custody of any CCSO property or equipment,” and, thus, was suspended for just cause.

VI Award

Based on the evidence presented at the hearing, I find that the Grievant’s 60-day suspension was not for just cause. Accordingly, the grievance is sustained.

The Employer is hereby directed to make the Grievant whole for all earnings, benefits, and seniority lost as a result of his 60-day suspension and to remove this suspension from his disciplinary record.

Decided this 6th day of August, 2008.

Saundria Bordone, Arbitrator